

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

DON PICCOLO, as an Individual, and
President and Owner of Magnum Trailers
Co.; DAN PICCOLO, as and Individual, and
President and Owner of Magnum 2005;
MAGNUM TRAILERS CO.; and
MAGNUM 2005,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-154

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

This matter arises from the appeal of a \$56,000 penalty issued by the Department of Ecology (Notice of Penalty No. DE 2614) on November 14, 2005 to Don Piccolo and Dan Piccolo, as individuals, and as Presidents and Owners of Magnum Trailers Co. and Magnum 2005, respectively, and to Magnum Trailers Co., and Magnum 2005. The penalty was imposed for violations of Chapter 70.105 RCW, the Hazardous Waste Management Act (HWMA).

A hearing was held in this matter on April 25, 2006, at the Board's hearing room in Lacey, Washington.

Board Member Kathleen D. Mix presided for the Pollution Control Hearings Board, joined by Board Chair William H. Lynch and Board Member Andrea McNamara Doyle. Senior Counsel Elliott Furst of the Attorney General's Office represented the Department of Ecology.

FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER
PCHB NO.05-154

1 Don Piccolo, acting *pro se* appeared on behalf of all Appellants. Also present was Dan Piccolo.
2 Kim Otis of Gene Barker & Associates, Olympia, Washington provided court-reporting services.

3 The legal issues identified in the Pre-hearing Order which governed the proceedings were
4 as follows:

- 5 1. Whether the order issued to Appellants is consistent with RCW 70.105.
- 6 2. Whether Appellants violated WAC 173-303-141(1), WAC 173-303-170(1)(a), and WAC
7 173-303-145(3).
- 8 3. Whether the penalty assessed for the noted violations was reasonable.

9
10 The Board received the sworn testimony of witnesses, admitted exhibits, and heard
11 arguments on behalf of the parties. Having fully considered the record, the Board enters the
12 following:

13 14 FINDINGS OF FACT

15 [1]

16 Magnum Trailers Co. (Magnum Trailers) builds various types of trailers for hauling, such
17 as boat trailers and flat beds. After fabrication of the trailers, the business spray paints the
18 trailers in a wooden shed at the back of the property. Magnum Trailers leases the property, which
19 is located in Ferndale, Washington, from Perry Pallet Co., owned by Max Perry. Don Piccolo,
20 President and Owner of Magnum Trailers, recently retired, and his son, Dan Piccolo, has taken

1 over the business and renamed it Magnum 2005. (Exhibits R-3, R- 5; Testimony of William
2 Angel).

3 [2]

4 On June 4, 2004, the Department of Labor and Industries notified the Department of
5 Ecology (Ecology) of a potential release of solvents into the environment at Magnum Trailers.
6 Ecology referred the complaint to the Whatcom County Health Department for investigation.
7 (Exhibit R-2; Testimony of Angel, Victoria Sutton).

8 [3]

9 On June 18, 2004, Mr. William Angel, an environmental health specialist with the
10 Whatcom County Health Department, responded to the complaint. When he arrived at Magnum
11 Trailers on June 18, Dan Piccolo showed Mr. Angel around the business. Mr. Angel observed
12 poor waste management practices. Spent paint waste had been sprayed onto a board lying on the
13 ground for evaporation, and the surrounding ground and soil appeared contaminated with the
14 spent paint waste. The soil was a different color, and there was a strong odor of solvents in the
15 area. The inspector also observed an uncovered bin of rags and other waste product. (Testimony
16 of Angel).

17 [4]

18 Mr. Angel discussed proper waste management practices with Dan Piccolo during this
19 initial inspection. He informed Mr. Piccolo of the Whatcom County Moderate Risk Waste
20 Facility as a possible ready source for disposal of certain wastes. He informed Mr. Piccolo that
21 waste product needed to be covered to prevent volatilization of solvents into the air, and gave

1 guidance on removal of contaminated soil. Mr. Angel discussed the need to dig up the
2 contaminated soil and informed Mr. Piccolo that the contaminated soil may be a hazardous
3 waste. Mr. Piccolo appeared to recognize and understand the need for clean-up of the site and
4 implementation of these waste management practices. (Exhibit R-2; Testimony of Angel).

5 [5]

6 In early July, 2004, Mr. Angel returned to the Magnum Trailer site for a follow-up
7 inspection. He found that some soil had been removed and placed in drums, but the drums were
8 uncovered. New soil which had been placed on top of the area of original contaminated soils
9 smelled strongly of solvents, leading Mr. Angel to believe that there was still heavily
10 contaminated soil at the site, and that the new soil had been contaminated by solvent ridden soil
11 beneath. Mr. Angel took a sample to measure for volatile organics. With an onsite screening
12 tool, he took a reading of 2000 parts per million (ppm) of volatile organics (solvents) in the area.
13 Mr. Angel advised the company that the soils were likely to be defined as a hazardous waste, not
14 simply a solid waste, and would, accordingly, require handling as an “F-listed” waste under the
15 state’s dangerous waste regulations. (See, WAC 173-303-9904). Mr. Angel informed the
16 company that it needed to properly clean up the soils and use proper waste management
17 practices. (Exhibit R-2; Angel testimony).

18 [6]

19 On September 8, 2004, Mr. Angel and Victoria Sutton, an Environmental Specialist and
20 Hazardous Waste Compliance Inspector with Ecology conducted another compliance inspection
21 at Magnum Trailers. Uncontained waste soils remained on the site. A consultant had not been

1 hired to properly remove and dispose of hazardous wastes. The inspectors again found a strong
2 solvent odor in soils. After digging down about twelve inches into the soils, the inspectors took
3 another high reading for solvents in the same soil area that had previously been of concern. The
4 inspectors continued to be concerned that soil, as well as other wastes, were “F-listed” hazardous
5 wastes. This conclusion was based on review of original containers on site and Material Safety
6 Data Sheets that accompany certain products. This information showed the gun wash solvents
7 used in processes at the site contained seventy percent (70%) toluene and thirty percent (30%)
8 acetone. Such wastes are federally listed hazardous wastes and meet the waste characteristic of
9 ignitability, having a very low flash point or low point at which the material will ignite. The
10 inspectors noted other waste streams that were not properly managed, including open containers
11 of waste, unlabeled containers of hazardous waste, lack of designation of wastes, and lack of
12 secondary containment of wastes, among other violations. (Testimony of Angel, Sutton).

13 [7]

14 During the September 8 inspection, the inspectors identified three drinking water systems
15 in the area, as well as a small stream and wetland area which was located fifteen to thirty feet
16 away from the site. Sandy soils observed at the site would allow solvents or contaminated water
17 to flow readily into surface water or the low groundwater table. (Testimony of Angel, Sutton).

18 [8]

19 On September 22, 2004, Ecology sent an Inspection Report via certified mail to Dan
20 Piccolo at Magnum Trailers. An employee at the business signed for receipt of the certified mail
21 on September 24, 2004. The Compliance Report included an attached “Compliance Certificate”

1 which offered the business owner the opportunity to demonstrate actions taken to achieve the
2 corrective measures outlined in the report. Ecology inspector Sutton contacted the owner of the
3 property, Max Perry, and discussed with him potential liability for clean-up under the Model
4 Toxics Control Act, RCW Ch. 70.105D. (Exhibits R-2, R-3; Testimony of Angel, Sutton).

5 [9]

6 On September 23, 2004, Victoria Sutton returned to the site and took soil samples from
7 the area around where the evaporation board had been used, as well as samples of paint thinner
8 waste and soils that had been placed in five gallon buckets. These samples were sent to the
9 Manchester Environmental Laboratory in Port Orchard, Washington for analysis. The Lab
10 analyzed samples from four waste streams at the Magnum Trailer site: 1) Solvent Dumping Area
11 #1, 2) Solvent Dumping Area #2, 3) Spent Gun Wash Solvent, and 4) Excavated Soil. High
12 levels of toluene, ethylbenzene and xylene were present in all samples analyzed by the Lab. The
13 detected levels were in excess of those that would trigger remediation requirements under the
14 Model Toxics Control Act. (Exhibits R-4; R-5; Testimony of Sutton).

15 [10]

16 In December, 2004, Ms. Sutton contacted Don Piccolo by phone because Ecology had
17 not received the September Compliance Certificate back from him or the business. He indicated
18 that he had not received the inspection report or certificate. Ms. Sutton emailed the report again,
19 and sent it certified mail. The certified mail was returned several days later, unaccepted. In
20 December 2004 and January 2005, there were a number of discussions with the property owner
21 and Don Piccolo about the need to hire a contractor to clean up the site. Mr. Piccolo expressed

1 interest in simply burning the contaminated soil on site, and was informed that either burning or
2 evaporation would be considered an illegal disposal, and that only permitted treatment, storage
3 or disposal facilities were allowed to engage in these type of waste treatments. A third certified
4 letter with information about the inspections and needed compliance was returned to Ecology,
5 unaccepted, on February 1, 2005. (Exhibits R-2, R-5; Testimony of Sutton).

6 [11]

7 On March 16, and April 28, 2005, Victoria Sutton conducted further inspections of
8 Magnum Trailers. During both inspections she observed most of the same violations that had
9 been found during earlier inspections. These included: 1) open containers of hazardous wastes,
10 2) unlabeled containers of hazardous waste, 3) failure to obtain an EPA site identification
11 number, 4) failure to designate wastes, 5) lack of secondary containment, 6) failure to conduct
12 weekly inspections, 7) failure to mitigate a release of hazardous waste, and 8) lack of
13 accumulation start dates. (Exhibit R-5; Testimony of Sutton).

14 [12]

15 In September, 2005, Magnum Trailers hired a consultant to begin to address the site
16 clean-up requested by Ecology over one year earlier, but gave the contractor a limited scope of
17 work that did not encompass removal of contaminated soils. During that year there had been
18 some modest attempts to change the methods by which waste streams were managed at the site
19 (e.g. the practice of spraying gun wash solvents to the ground ended). There had been some
20 attempt to excavate and contain solvent-contaminated soils, albeit not in compliance with
21 regulatory standards. Even with the hiring of a consultant, work to clean up the site moved

1 sporadically, and it took the efforts of the property owner, Max Perry, to finally make progress
2 on site remediation in the late fall of 2005. (Exhibits A-1, R-2; Testimony of Sutton).

3 [13]

4 In November 2005, Ecology inspector Sutton prepared a Recommendation for an
5 Enforcement Order and Penalty against the Piccolo's and Magnum Trailers, based on the on-
6 going violations of the Dangerous Waste Regulations (Chapter 173-303 WAC) at Magnum
7 Trailers. Inspector Sutton created graphs to compare the type and frequency of violations that
8 had been documented during the site visits on September 8, 2004, March 16, 2005, and April 28,
9 2005. Sutton focused her recommendation on three of the most serious violations found at the
10 Magnum Trailers site, as these types of violations were considered "Compliance Indicator"
11 violations, and high priority for response by Ecology. Several instances of each type of serious
12 violation had been observed during the various inspections. (Exhibit R-5; Testimony of Sutton).

13 [14]

14 On November 14, 2005, Ecology issued an Administrative Order No. DE 2613 and
15 Notice of Penalty No. DE 2614 to Don and Dan Piccolo, individually and as Presidents and
16 Owners of Magnum Trailers and Magnum 2005, and to the companies. The Administrative
17 Order directed compliance with various regulatory requirements. The Notice of Penalty focused
18 on the following significant violations of the dangerous waste regulations:

19 1. Failure to offer hazardous waste to a treatment, storage, and disposal facility (TSD)
20 operating under a permit, or to a facility authorized to receive waste under this chapter. WAC
21 173-303-141(1).

2. Failure to adequately designate dangerous wastes. WAC 173-303-170(1)(a).

3. Failure to take appropriate mitigation and control actions after a spill or discharge.

WAC 173-303-145(3).

(Exhibits R-6, R-7; Testimony of Sutton).

[15]

Ecology assessed a penalty in the amount of \$56,000. The penalty was calculated based on a matrix that analyzed the seriousness of the violations, number of instances of each violation and the number of inspections in which the violations occurred. Ecology attributed a range of possible penalties, from the maximum allowable to the minimum that the agency would impose for each violation. Ecology characterized each of the violations as a “major” violation because waste had been disposed of into the environment; the business was unaware of the waste streams it generated and discharged; and the business had allowed dangerous chemicals to sit in the open, presenting the possibility of infiltration to the surrounding environment—both air and water. The maximum penalty for such “major” violations is \$10,000 per violation. Given the number of repeated major violations through the several inspections, the matrix calculated the highest possible total penalty at \$140,000; the lowest at \$42,000. (Exhibit R-5, Table 6; Testimony of Sutton).

[16]

In determining the amount of the penalty, Ecology also used the Environmental Protection Agency's (EPA) model for calculating the financial benefits gained by a business for delaying or avoiding the cost of regulatory compliance. This "benefits of noncompliance" model

1 (BEN) calculated an economic benefit to Magnum Trailers of over \$29,000 for long term
2 noncompliance with regulatory requirements. (Exhibit R-5; Testimony of Sutton).

3 [17]

4 In determining the penalty amount, Ecology recognized there were some mitigating
5 factors in the favor of Magnum Trailers. The agency noted that there had been some attempt to
6 remediate the situation, although the clean up had not occurred in a timely fashion. The agency
7 considered the fact that the business had ceased some of the violations, and that while there were
8 a number of waste management problems, not all the waste was hazardous and subject to that
9 regulatory scheme. (Testimony of Sutton).

10
11 Any Conclusion of Law deemed a Finding of Fact is hereby adopted as such.

12 CONCLUSIONS OF LAW

13 [1]

14 The Board has jurisdiction over the subject matter and parties pursuant to RCW
15 43.21B.300. The Board reviews the issues raised in an appeal *de novo*. WAC 371-08-485.

16 [2]

17 Chapter 70.105 RCW gives Ecology broad powers related to the management of
18 hazardous wastes and the release of hazardous substances, including the power to penalize any
19 person who fails to comply with the provisions of the chapter and the rules adopted thereunder.
20 RCW 70.105.080. Ecology may impose of penalty of not more than \$10,000 per day for every
21 violation. Each and every violation is a separate and distinct offense. RCW 70.105.080.

FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER
PCHB NO.05-154

1 [3]

2 In an appeal of a penalty, the burden of proving that a party is liable for a civil penalty is
3 on the agency issuing the penalty. The agency must prove that the violation occurred and that
4 the penalty was reasonable by a preponderance of evidence. *PL-2 Corp. v. Ecology*, PCHB No.
5 00-134 (2001); *Kaiser Aluminum Corp. v. Ecology*, PCHB No. 99-121, 99-135 (2000); *M/V*
6 *Ping v. Ecology*, PCHB No. 94-118 (1995); WAC 371-08-485(2).

7 [4]

8 The Board considers three factors when it evaluates the reasonableness of a penalty: (1)
9 the nature of the violation, (2) the prior history of the violator, and (3) the remedial actions taken
10 by the penalized party. *Douma v. Ecology*, PCHB No. 00-019 (2005); *Crestview Development,*
11 *Inc. v. PSCAA*, PCHB No. 04-059 (2004); *Kaiser Aluminum*, at CL V. As part of such an
12 analysis, the Board has also looked to whether the appellant gave any reason for refusing to
13 cooperate with agency efforts to bring a project into compliance with the law, and the fact that
14 Ecology imposed a lesser penalty than allowed by law. *Engman & Timberlake Associates Inc. v.*
15 *Ecology*, PCHB No. 98-63 (1999).

16 [5]

17 The Appellants do not dispute that there were bad waste management practices at the
18 Magnum Trailers site, nor that the site had become contaminated with solvent waste. Appellants
19 dispute the seriousness of the alleged violations, the size of the penalty, and the application of
20 certain regulations to their business practices. Appellants assert that there were less costly, yet
21

1 equally efficient measures, that could have been taken to treat the waste. Appellants note that the
2 violations were not willful.

3 [6]

4 Mr. Piccolo argued that he believed it was correct to pour solvents onto a board for
5 evaporation. He also suggested that the Magnum Trailers site should be managed in the same
6 manner as petroleum contaminated sites, making reference to how he understood gasoline
7 stations are allowed to treat gasoline contaminated soils or wastes. Mr. Piccolo believes that if a
8 business can spray paint vehicles, thereby allowing solvents to evaporate into the atmosphere, it
9 is also acceptable to either incinerate soils on-site, or allow aeration and evaporation of solvents
10 into the atmosphere as an on-site clean-up and treatment method. He believes Ecology has
11 overreacted to the seriousness of the waste problems at Magnum Trailers.

12 [7]

13 **Violations of Dangerous Waste Regulations**

14 The arguments of Appellants are not persuasive and ignore the comprehensive statewide
15 framework for regulation and management of hazardous wastes, designed to prevent pollution of
16 land, air, and water. RCW 70.105.007. As a business that generates and discards waste
17 material, Magnum Trailers is a “generator” under the Hazardous Waste Management Act and has
18 a duty to determine whether or not their wastes are regulated under that Act. *Hickle v. Whitney*
19 *Farms, Inc.* 148 Wn.2d 911, 919, 64 P.3d 1244 (2003). The Ecology inspector testified that a
20 different set of regulatory requirements are applicable to petroleum-contaminated soils and that
21 spray painting is to be contained in order to prevent release of contaminants into the atmosphere.

1 [8]

2 The Board concludes that Appellants failed to offer hazardous waste to a treatment,
3 storage, and disposal facility (TSD) operating under a permit, or authorized to receive waste in
4 violation of WAC 173-303-141(1). Listed hazardous wastes, in the form of gun wash solvents
5 containing acetone and toluene, were disposed of on a board for evaporation. The solvents
6 spilled onto the surrounding soil. A generator of waste does not have discretion to determine
7 how to dispose of waste. The Dangerous Waste Regulations contained at Chapter 173-303 WAC
8 prescribe the methods for appropriate treatment and disposal. Magnum Trailers failed to abide
9 by the regulatory scheme. See, *PL-2 Corp. v. Ecology*, at CL XXII-XXIII.

10 [9]

11 The Board concludes that Appellants failed to adequately designate dangerous wastes, in
12 violation of WAC 173-303-170(1)(a). Both the testimony of the Ecology inspector and
13 numerous photographs introduced at hearing demonstrated various waste streams of unknown
14 character. The evidence showed drums and containers of unknown materials in several locations
15 at the site. Many such containers sat without labels or covers from one inspection to the next.
16 Undesignated wastes included gun wash solvents, contaminated soil in buckets or bins, used
17 solvent-contaminated towels, containers of unknown liquid wastes under a trailer and in one
18 corner of the site and drums of asphalt and EZ Strip. It is the responsibility of the generator of
19 dangerous wastes to properly designate the wastes utilizing the procedures spelled out in the
20 regulations. *PL-2 Corp.*, at CL V; *Hickle* 148 Wn.2d at 919.

1 [10]

2 The Board concludes that the Appellants failed to take appropriate mitigation and control
3 actions after a spill or discharge, in violation of WAC 173-303-145(3). It is undisputed that
4 Magnum Trailers employees disposed of paint gun wash onto a board for evaporation, and there
5 was resulting contamination of the underlying and surrounding soil with solvents. This release
6 of a hazardous substance required Magnum Trailers to take appropriate and immediate action to
7 protect human health and the environment, including clean-up of all released dangerous wastes.
8 WAC 173-303-145(3); *Brown Boy Feed, Inc. v. Ecology*, PCHB No. 02-050 (2003). The
9 evidence before the Board demonstrated that it was over one year before a contractor was in
10 place and taking steps to clean-up the contaminated soil at the site. During this time, nearby
11 surface and groundwater was put at risk, and dangerous waste was released to the air. Such
12 releases had the potential to harm both human health and the environment. Ultimately it was the
13 property owner, and not Magnum Trailers, that took steps to effectuate a clean-up of the
14 contaminated soils.

15 [11]

16 **Reasonableness of Penalty**

17 Ecology has met its burden to prove that the penalty imposed was reasonable.

18 The nature of the violations committed by Magnum Trailers was serious. Although
19 advised numerous times to do so, Magnum Trailers did not take action to offer its waste to a
20 permitted TSD facility, thereby allowing release of dangerous wastes to the environment. The
21 failure of Magnum Trailers to adequately designate its own waste streams is also a serious

1 violation. It is incumbent upon the business to know the waste streams it generates, and handle
2 them accordingly. The failure to take appropriate mitigation and control action in response to the
3 spilled solvents, particularly after being informed of the serious nature of the problem, is a
4 serious violation. It is particularly so because of the dangerousness of the chemicals to human
5 health, and the risk of infiltration to the air and water. Because each of the violations was
6 serious, the penalty amount is reasonable under the first prong of the applicable three part test.

7 [12]

8 There was no evidence that Magnum Trailers had a history of enforcement actions
9 against it. However, Magnum Trailers had apparently been in noncompliance with applicable
10 regulations for several years before Ecology became aware of the poor waste management
11 practices and conducted a site inspection. The business did not understand the importance of
12 managing wastes consistent with the regulations and was willing to substitute its own judgment
13 for that of Ecology as to how wastes should be managed and whether any threat was posed to the
14 surrounding environment by disposal methods. Given the lack of diligence in responding to the
15 situation after the initial inspection, and the length of time in which the business had not properly
16 managed its waste products, the penalty is reasonable.

17 [13]

18 While some attempts were made to excavate and contain soils and modify some waste
19 disposal practices, the Board concludes that there was a lack of reasonable diligence in
20 responding to and rectifying the waste management problems observed at the site. It took five
21 separate inspections, numerous conversations, repeated mailings of compliance certificates and

1 an administrative order and penalty before a contractor was on-site and engaged in the clean-up
2 activity that inspectors had requested from the outset. Magnum Trailers failed to respond to
3 three separate “compliance certificates” which outlined specific areas of compliance and
4 provided deadlines for corrective measures (See Exhibit R-3). Appellant offered no credible
5 evidence or reason for failing to cooperate or comply with the corrective measures and deadlines
6 outlined by Ecology. Indeed, if the purpose of a penalty is to motivate compliance with the law,
7 it had its intended effect in this case, as compliance and clean-up actions ultimately moved
8 forward only after the November 2005 Administrative Order and Penalty.

9 [14]

10 Having considered the three factors that the Board uses to evaluate the reasonableness of
11 a penalty, the Board concludes that the penalty against Magnum Trailers is reasonable. The
12 Board also notes that Ecology imposed a lesser penalty than allowed by law, taking into account
13 several mitigating factors on behalf of Magnum Trailers. For example, for the failure to
14 designate waste streams, Ecology could have imposed a penalty of \$100,000, based on multiple
15 instances of this violation. Instead, Ecology calculated these violations at a medium sanction
16 level of \$24,000. Other violations were similarly mitigated by the agency in the matrix analysis.

17 [15]

18 One reason to impose penalties on a business for lack of compliance with regulatory
19 requirements is to ensure a “level playing field” for those businesses that incur necessary costs to
20 comply with all requirements of the law. In addition to the factors stated above, the Board
21 concludes that Magnum Trailers gained an economic advantage by its lack of compliance, and

1 that the penalty is justified and reasonable in order to ensure a level playing field for all
2 businesses.

3 Based on the evidence in this case regarding the seriousness of the violations, the prior
4 history of Magnum Trailers, and the lack of diligence in taking needed remedial actions, and
5 other factors noted above, the Board finds the \$56,000 penalty imposed by Ecology to be
6 reasonable and appropriate.

7 ORDER

8 The penalty issued by the Department of Ecology in Notice of Penalty No. DE 2614, in
9 the amount of \$56,000, is AFFIRMED.

10 DONE this 10th day of May 2006.

11 KATHLEEN D. MIX, PRESIDING

12 WILLIAM H. LYNCH, CHAIR

13 ANDREA MCNAMARA DOYLE, MEMBER
14
15
16
17
18
19
20
21